IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 19, 2008 Session

TRAVIS GOODMAN, ET AL. v. KATHY JONES

Appeal from the Circuit Court for Morgan County
No. 6477C Russell E. Simmons, Jr., Judge

No. E2006-02678-COA-R3-CV - FILED JANUARY 12, 2009

Travis Goodman and his wife, Stephanie Goodman ("the Buyers"), sued Kathy Jones[1] ("the Seller") seeking rescission and damages based upon theories of fraud, misrepresentation, breach of contract and violations of the Tennessee Consumer Protection Act ("the TCPA"). The TCPA claim was dismissed by the trial court and no issue is raised by the Buyers on appeal regarding the propriety of this action. This suit arises out of alleged defects in a septic system on residential property that the Seller sold to the Buyers. Acting on the Seller's motion, the trial court – at some unidentified time prior to trial – required the Buyers to elect a single remedy from their dually requested relief of rescission and damages. The Buyers chose rescission; accordingly, the case was submitted to the jury as one for rescission only. The court instructed the jury on the Buyers' theory of intentional misrepresentation (fraud) but failed to charge on the theories of breach of contract and non-fraud (negligent) misrepresentation. The jury found in favor of the Seller and the Buyers' suit was dismissed *in toto*. The Buyers appeal. We affirm the trial court's judgment dismissing the Buyers' request for rescission based upon an intentional misrepresentation. We vacate the remainder of the judgment. In so doing, we hold that the trial court erred in failing to charge the jury with respect to the Buyers' theories of breach of contract and negligent misrepresentation.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J, and SHARON G. LEE, SP.J., joined.

Glenna W. Overton, Knoxville, Tennessee, for the appellants, Travis Goodman and Stephanie Goodman.

Joe R. Judkins, Wartburg, Tennessee, for the appellee, Kathy Kelly, formerly Kathy Jones.

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[1] In a pleading filed by the Seller, she states that her "correct name is now Kathy Kelly."

OPINION[2]

I.

Facts and Procedural History

In May 2004, the Buyers purchased a 14-year-old house in a subdivision from the Seller for $86,500. The Seller had been the only owner of the residence on the subdivided lot. Several weeks after moving into the residence, the Buyers discovered two inches of water in the crawlspace. Within three months of moving, the Buyers had problems with the septic system. The shower would not drain, and, at times, the commode would not flush and would overflow. When the Buyers did laundry, water backed up into the bathtub. On at least one occasion, when the Buyers did laundry, sewage backed up into the tub. Because of health concerns, the Buyers took their young child to another house for bathing.

The Buyers found water in the crawlspace on numerous occasions, and sometimes they also found sewage. After a heavy rain, water would stand on the property for days at a time and the septic system would not work. The Buyers put a fan in the crawlspace and diverted the water from gutters away from the septic system. These attempts did not solve the problem. The Buyers also had the septic system pumped twice in November 2004 and learned at that time that water in the drain field was running into the septic tank.

In April 2006, the Buyers had the septic tank pumped again, and as water was pumped from the tank, the tank would immediately fill up with clear water. The Buyers videotaped the pumping, and the tape was shown to the jury. In about an hour, the septic tank company pumped some 1,860 gallons of water out of a 900-gallon septic tank. Following this, the Buyers moved to a rental house.

As previously noted, the Buyers sued the Seller for "fraud, misrepresentation, breach of [c]ontract and violation of the Tennessee Consumer Protection Act." In their brief, the Buyers acknowledge that the trial court correctly dismissed their cause of action filed pursuant to the Tennessee Consumer Protection Act.

The Buyers, in their complaint, stated the following under "Allegations of Liability":

> The Defendant perpetrated a fraud by failing to disclose, through the Tennessee Residential Property Condition Disclosure, a defect/malfunction of the septic system that existed since the residence was constructed.

[2]This opinion takes the place of one filed in this case on October 30, 2008. That latter opinion was withdrawn by order entered November 5, 2008.

> The Defendant misrepresented by failing to disclose, through the Tennessee Residential Property Condition Disclosure, that there were no defects/malfunctions of the septic system.
>
> The Defendant misrepresented by failing to disclose, through the Tennessee Residential Property Condition Disclosure, that there [were] no drainage, flooding or grading problems.
>
> The Defendant has breached the Sales Contract by the fraud and misrepresentation contained in the Tennessee Residential Property [sic] Disclosure.
>
> The Defendant is in violation of the Tennessee Consumer Protection Act by the fraud and misrepresentations made by the Defendant in the Tennessee Residential Property Condition Disclosure. These fraudulent statements and misrepresentations were unfair an deceptive acts.

(Paragraph numbering in original omitted.) The Buyers sought rescission and damages in multiple forms:

> Rescission of the sale of the residence;
> Money damages for moving expenses;
> Money damages for cost of living in another residence;
> Money damages for loss [of] use and enjoyment;
> Other recoverable costs or in the alternative of rescission,
> the cost to repair;
> Treble damages;[3]
> Attorney fees; and
> All other relief allowed by law.

(Lower case letters in front of each item in original omitted.)

At trial, the Buyers called a civil engineer as an expert witness. He testified that the subdivision was built on a valley floor, surrounded by hills and low mountains. The effect of the surrounding topography was to create a sort of bowl with the Buyers' home being on one of the lowest lots in the subdivision. The expert noted that there had been no change in the watershed since the house was constructed. He also relied on records of the Health Department that showed there was a study of the subdivision in 1990 that found most of the houses in the subdivision had, or were having, failures of their septic systems due to excess groundwater.

[3]The Buyers' request for treble damages and attorney's fee was apparently related to their dismissed TCPA claim.

The Buyers' expert had seen the videotape of the April 2006 pumping of the septic tank and expressed his opinion that the septic system drain field was working in reverse. Instead of dispersing liquids from the septic tank, it was functioning as a conduit for the groundwater to fill up the tank. In other words, the groundwater was filling the septic tank faster than the water in the tank could be pumped out by the septic company.

The expert testified that the groundwater level at the property fluctuates somewhat seasonally, but that the real problem is a confining layer of soil that is several feet underground and prevents water from seeking a deeper zone. The expert stated that:

> [i]t is my opinion that the problem with the septic tank will occur at any time that the water table in the neighborhood is higher than the elevation of the drain field. I saw no evidence in my site visit to the neighborhood to indicate that this was a recent phenomenon. And it is my opinion that this has likely been going on since the subdivision was constructed.

In forming his opinions, the expert also had examined and relied upon water-use records for the property. He testified that the average water use per person in the United States is 100 gallons a day or 3,000 gallons a month. From January 2000 through June 2004, there were four months in which the Seller used only 200 gallons a month – this would be approximately one flush of the commode per day. During the time the Buyers were considering the purchase of the property, the Seller's water usage was merely 200 to 1,000 gallons a month. The expert thus expressed the opinion that the Buyers could not have determined that the septic system was damaged, and a home inspection would not have discovered the damage without digging up the system. A home inspection was made in this case, but the home inspection is based on visual inspection and did not include the septic system.

The Buyers' expert also testified that shallow groundwater contaminated with sewage entering the crawlspace could cause a health hazard. In addition, he said that the system cannot be corrected, because the groundwater table is higher than the septic tank. When he was asked, based on everything that he had reviewed, whether it was possible for the Seller to reside in the house for 14 years without experiencing a problem, the expert responded, "[T]hat's not possible."

As part of their proof, the Buyers submitted the Tennessee Residential Property Condition Disclosure that the Seller filled out prior to the sale. One question on the disclosure form was, "Are you (Seller) aware of any defects/malfunctions in [sewer/septic]?" Given the choices of "yes," "no" and "unknown," the Seller answered "no." In another section of the disclosure form, the Seller was asked, "Are you (Seller) aware of any of the following," with one of the following categories being "flooding, drainage or grading problems?" Once again, given a choice of answering, "yes," "no," or "unknown," the Seller answered "no." In addition, to a question whether the septic tank meets "present state and local requirements for the actual land area and number of bedrooms and facilities existing at the residence[,]" the Seller answered "yes." The Seller attested that the information supplied was "true and correct [to] the best of my/knowledge as of the date signed." As an

undertaking in the sales contract, the Seller warranted that the septic system (along with a number of other systems) would be working on the day of the closing.

The Seller testified that water would stand on the property for two to three days. She said that she never inspected the crawlspace and did not know if water or sewage were in the crawlspace. The Seller testified that she was often away on weekends. She also said that she had contracted for the original construction of the house, which came with a one-year warranty, and there were no problems with the septic system during the period of the warranty.

The Seller testified that, during the entire time she owned the property, she had no problems with the septic system and that there were no signs indicating there might be a problem with the system. The Seller had no repairs performed on the septic system and had not had the septic tank pumped. A woman who cleaned the Seller's house, and came to the house regularly, testified that she had seen no problem with the septic system. Neighbors also testified that they had observed no problems with the system. The Seller's fiancé, who was at the house regularly, was not aware of any septic system problems and neither was the home builder. Although the Health Department had done a study, no one at the Department had ever contacted the Seller. The Buyers' home inspector and the appraisers for the Buyers' lender did not uncover any problems.

The Seller established that the home inspection could have included a septic system inspection if the Buyers had requested it. Also, the Buyers waived their right to purchase a home warranty that would have cost around $300. The Seller did not produce an expert witness.

The jury returned a verdict in favor of the Seller. The Buyers appeal.

II.

Issues

The Buyers raise the following issues:

> 1. Whether the trial court erred by not charging the jury with the definitions of breach of contract, misrepresentation, fraud and negligent misrepresentation.
>
> 2. Whether the trial court erred by holding that the burden of proof was clear and convincing evidence.
>
> 3. Whether the jury verdict was contrary to the weight of the evidence presented at trial.

III.

Standard of Review

The Buyers challenge the sufficiency of the evidence in this case. Our standard of review as to factual matters in a jury case is limited to determining whether there is material evidence to support the jury's verdict. ***Crabtree Masonry Co. v. C & R Constr., Inc.***, 575 S.W.2d 4, 5 (Tenn. 1978). In reviewing a judgment based on a jury verdict, we do not determine the credibility of the witnesses or weigh the evidence. ***Pullen v. Textron, Inc***., 845 S.W.2d 777, 780 (Tenn. Ct. App. 1992). "Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Tenn. R. App. P. 13(d). We examine questions of law under a pure *de novo* standard of review; we accord no presumption of correctness "to the conclusions of law made by the lower courts." ***Southern Constructors, Inc. v. Loudon County Bd.***, 58 S.W.3d 706, 710 (Tenn. 2001).

IV.

A.

Jury Instructions

The Buyers argue that the trial court erred in failing to charge the jury with respect to their theories of breach of contract, misrepresentation, fraud and negligent misrepresentation. They point out that the trial court only charged the jury as to whether the Seller was guilty of a violation of Tenn. Code Ann. § 66-5-208, a section of the Tennessee Residential Property Disclosure Act ("the Act").

The determination of whether jury instructions are proper is a question of law that this court reviews *de novo* with no presumption of correctness. ***Solomon v. First Am. Nat'l Bank of Nashville***, 774 S.W.2d 935, 940 (Tenn. Ct. App. 1989). The determination is crucial because

> the soundness of every jury verdict rests on the fairness and accuracy of the trial court's instructions. Since the instructions are the sole source of the legal principles needed to guide the jury's deliberations, trial courts must give substantially accurate instructions concerning the law applicable to the matters at issue.

Ladd v. Honda Motor Co., Ltd., 939 S.W.2d 83, 94 (Tenn. Ct. App. 1996) (citations omitted). We consider the jury charge as a whole, and we will not invalidate it if it fairly defines the legal issues in the case and does not mislead the jury. ***Hunter v. Burke***, 958 S.W.2d 751, 756 (Tenn. Ct. App. 1997) (citations omitted).

The trial court's charge as to intentional misrepresentation was as follows:

> [Buyers] seek rescission of the sale of the home for alleged intentional misrepresentation of [Seller]. To have the sale rescinded, [Buyers] must prove by clear and convincing evidence each of the follow[ing] elements:
>
> No. 1, that [Seller] made a representation of a present or past material fact on the Disclosure Statement entered as Exhibit 2.
>
> No. 2, that the representation was false.
>
> And No. 3, that [Seller] knew the representation was false when it was made.
>
> And No. 4, that . . . [Seller] intended that [Buyers] rely upon the representation and act or not act in reliance on it.
>
> And No. 5, [Buyers] did not know that the representation was false, and [were] justified in relying upon the truth of the representation.
>
> And No. 6, as a result of [Buyers'] reliance upon the truth of the representation, [Buyers] sustained damage.

This charge does not precisely parallel the language of Tenn. Code Ann. § 66-5-208. The language of the charge is essentially identical to the the Tennessee Pattern Jury Instruction on "Intentional Misrepresentation" requested in "[the Buyers'] Jury Instruction Number 6." The trial court prefaced its instruction on intentional misrepresentation with the following:

> In this lawsuit, the Plaintiffs are relying on a law passed by the Tennessee Legislature, and known as the Tennessee Residential Disclosure Act. This act requires a seller of residential real property to either provide the buyer with a Disclosure Form set out in the statute or to provide a Disclaimer Statement stating that the property is being sold as-is.
>
> * * *
>
> The bottom line is that the law requires a seller of residential real property to reveal to a prospective buyer the condition of the property involving any material defects which are known to the seller at the time of the disclosure.

The trial court told the jury that the plaintiff "must prove [the elements of the cause of action] by clear and convincing evidence." Since the Buyers are seeking, among other things, to set aside the deed from the Seller, this was a correct instruction. ***Myers v. Myers***, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994) ("[W]e note that to set aside a deed, it is well-settled that the proof must be clear,

cogent and convincing.") *See also* ***Estate of Acuff v. O'Linger,*** 56 S.W.3d 527, 531 (Tenn. Ct. App. 2001).

The Buyers point to the trial court's charge under the Act as being wrong and misleading. They argue that, contrary to the trial court's view, they did not allege a cause of action under the Act but rather a claim for intentional misrepresentation of the common law variety.

At some point in the proceedings below – and when this happened is not documented in the record – the trial court determined that it was only going to charge the jury with respect to intentional misrepresentation under the Act, Tenn. Code Ann. § 66-5-201, *et seq*. (2004)**.** As far as the Buyers' suit claiming an intentional misrepresentation is concerned, we can understand why the court ruled as it did. As previously noted in this opinion, the Buyers in their complaint made several references to the disclosure form that lies at the very core of the Act. If the trial court misconstrued the Buyers' cause of action for intentional misrepresentation – and arguably the court acted reasonably when it interpreted the language of the complaint – the Buyers had a duty to attempt to correct the court's "error." There is nothing in the record before us showing that the Buyers attempted to take issue with the trial court's interpretation *prior* to the court's charge. We are not required to address an error of a trial court when the record fails to reveal that the aggrieved party took timely action to correct the error of the lower court. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). Given the record before us,[4] we find nothing to indicate that the Buyers, prior to the jury's verdict, took any action to "nullify" the trial court's alleged error in limiting the Buyers' cause of action for intentional misrepresentation to one under the Act.

There is a more fundamental reason to resolve this issue against the Buyers. That is because the trial court actually charged the jury with essentially the same charge requested by the Buyers although the court said that it was charging under the Act. Thus, the Buyers' theory that the Seller was guilty of making intentional misrepresentations in the disclosure form was accurately placed in front of the jury and the elements of that cause of action were correctly charged by the court. The court also correctly charged the jury that the Buyers' burden in seeking rescission for the Seller's alleged fraud was to present clear and convincing evidence of the fraud. Since the Buyers elected to proceed on the remedy of rescission,[5] the trial court's charge with respect to clear and convincing evidence is correct whether the suit is denominated as one under the Act or one pursuant to the common law. This is true because, in either event, the remedy of rescission in this case necessarily involves the setting aside of a deed. ***Myers***, 891 S.W.2d at 219.

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[4] As a general proposition, the party raising an issue has the responsibility of ensuring that a record showing the error is prepared and filed. ***In re MLD***, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005). If a more complete record in this case would have shown the Buyers' objection to the trial court's decision with respect to the intentional misrepresentation claim, the Buyers should have caused that record to be filed.

[5] The Buyers do not make an issue on appeal challenging the correctness of the trial court's decision to require them to elect between rescission and damages.

The Buyers' suit for rescission of the deed because of an intentional misrepresentation was fairly and completely litigated between the parties and correctly charged by the trial court. Accordingly, we affirm the judgment below on the Buyers' claim of intentional misrepresentation.

In response to the Buyers' first issue, the Seller contends that the trial court actually charged the jury on the Buyers' other theories of recovery, but she does not cite to the record. After reviewing the charge, it is clear to us that the trial court did *not* charge the jury on the theories of breach of contract and *negligent* misrepresentation. A trial court should instruct the jury on every issue of fact and theory of the case that is raised by the pleadings and is supported by the proof. ***Ward v. Glover***, 206 S.W.3d 17, 40 (Tenn. Ct. App. 2006); ***Street v. Calvert***, 541 S.W.2d 576, 584 (Tenn. 1976); ***Spellmeyer v. Tenn. Farmers Mut. Ins. Co.***, 879 S.W.2d 843, 846 (Tenn. Ct. App. 1993). Reviewing the record *de novo*, we hold that the Buyers alleged the common law theories of breach of contract and negligent misrepresentation. We further hold that the documents in the record, including the disclosure form, along with the testimony favorable to the Buyers' case, if believed by the jury, would arguably support both of these causes of action. The trial court erred in failing to charge these two theories. As a result of this failure, we vacate so much of the trial court's judgment as dismisses the Buyers' suit based upon these two causes of action.

B.

Burden of Proof

The Buyers assert that the trial court erred in charging the jury that their burden of proof is clear and convincing evidence rather than, as argued for by the Buyers, preponderance of the evidence. As we have noted earlier in this opinion, any claim of the Buyers seeking rescission of the Seller's deed must be shown by clear and convincing evidence. ***Myers***, 891 S.W.2d at 219. To the extent that the Buyers are seeking *damages* on remand, the burden of proof is preponderance of the evidence.

C.

Sufficiency of the Evidence

The remaining issue raised by the Buyers is that the jury verdict was contrary to the weight of the evidence presented at trial. As we have previously intimated, the Buyers' statement of this issue does not correctly state our standard of review of a judgment based upon a jury verdict. With respect to factual issues, a judgment based on a jury verdict will not be disturbed on appeal if there is material evidence in the record to support the verdict. ***Reynolds v. Ozark Motor Lines, Inc***., 887 S.W.2d 822, 823 (Tenn. 1994) (citations omitted). In this case, there is evidence in the record favorable to the Seller, particularly the testimony of the Seller herself, including the testimony of

other individuals, that is sufficient to sustain a verdict for the Seller on the Buyers' claim of intentional misrepresentation. This issue is found adverse to the Buyers.

V.

Election of Remedies

At trial, the jury was told that the Buyers' suit was solely one for rescission. The record does not contain an order requiring the Buyers to elect between its requested dual relief of rescission and damages; but there is in the record the pre-trial motion of the Seller seeking an order of the trial court "requiring [the Buyers] prior to empanelling [sic] a jury, to elect which remedies [the Buyers] are seeking." In her motion, the Seller states

> that the Complaint seeks remedies that are inconsistent in that the Complaint seeks rescission and also monetary damages.

In her brief, the Seller states that

> the plaintiffs were required to make an election of remedies. The plaintiffs elected the remedy of rescission.

As we have previously noted, the Buyers do not challenge the authority of the trial court to require them to elect, pre-trial, between rescission on the one hand and damages on the other. Since the propriety of the court's action is not before us, we do not address it as far as the Buyers' claim of intentional misrepresentation is concerned. However, since this case is being remanded for a new trial on the Buyers' theories of breach of contract and negligent misrepresentation, we will address the issue of election of remedies going forward.

In the case of ***Isaacs v. Bokor***, 566 S.W.2d 532 (Tenn. 1978), the Supreme Court examined the interplay between rescission and damages in a case involving a jury verdict granting both. The core facts of the case, as recited by the High Court, are as follows:

> In this case the petitioners sued respondent claiming damages for alleged tortious misrepresentations and also seeking rescission of two transactions between the parties. Petitioners purchased from respondent a lot in a subdivision of which he was both the owner and the developer. Subsequently, under a separate agreement, respondent had begun to construct a residence for petitioners when it was

> discovered that the building site was outside the lot which they purchased.

Id. at 534. The case was tried to a jury. The jury found for the plaintiffs and granted them compensatory damages of $50,000 and punitive damages of $37,500. ***Id***. "In its verdict the jury also awarded rescission to the plaintiffs." ***Id***. The Court of Appeals reversed and remanded for a new trial. ***Id***. The Supreme Court granted certiorari. ***Id***. In reversing the judgment of the Court of Appeals, the Supreme Court affirmed "the compensatory award and of rescission." ***Id***. at 541. It reversed the jury's award of punitive damages, noting

> that there was no evidence whatever of deliberate fraud or deceit on the part of Mr. Bokor, so as to justify an award of punitive damages against him under the circumstances of this case.

Id. This is important to our review of the instant case because the Supreme Court's discussion of rescission and damages – which we will shortly quote – must be read against the backdrop of a case in which the High Court found no "deliberate fraud or deceit." ***Id.*** Going forward, the instant case will likewise not involve a claim of "deliberate fraud or deceit."

In approving both the jury's verdict of rescission *and* its award of damages, the Supreme Court opined as follows:

> A purchaser who has been the victim of a misrepresentation or who has been induced to contract through a mistake of material fact mutual to him and his vendor, is afforded by courts both of law and equity with a number of alternate remedies, including actions for rescission and restitution, actions for breach of contract and actions in tort for misrepresentation. All that the law requires of such a purchaser is that he elect consistently among the remedies available to him. Of course, by his conduct he may not both affirm and at the same time disaffirm his contract. We do not find that petitioners have done this, and we find that they, through counsel, have at all times elected to treat the two contracts involved as rescinded and to pursue a remedy for damages at law, rather than seek similar relief which might have been available to them in equity. However, we have already pointed out that it was also necessary for them to seek a judicial declaration of their right to rescission because of the denial thereof by respondent.

> In its opinion, the Court of Appeals indicated that rescission may not be a proper remedy for a contract which has been partially executed, and it also indicated that damages recoverable upon a declaration of rescission are limited to the purchase price paid for the property. These rules are not necessarily applicable in all cases, ...
>
> While it is true that the present action was cast partly as one for tort, there were material allegations seeking rescission and restitution. In the area of the law involving the rights of vendor and purchaser of real property, considerations of restitution and rescission are relevant, as well as the more limited and familiar elements of a tort action for fraud and deceit or those involving *negligent misrepresentation*. *Petitioners in this action did not seek merely damages for loss of bargain afforded in tort actions. Damages in such actions are awarded consistently with an election to affirm a contract and to keep its benefits, but to claim compensation for a difference in value. . . .*
>
> It is true that generally a purchaser who has been the victim of either fraud or mistake, upon rescission, is allowed to recover the consideration or purchase price which he paid for the property. In very many cases, that is the only amount involved. . . .
>
> *It does not necessarily follow, however, that because refund of the purchase price is a common measure of damages upon rescission, it is the only amount which can ever be recovered by the complaining party.*

Id. at 537-38 (citations omitted; emphasis added). The Supreme Court in ***Isaacs*** clearly stated that "it is too narrow a view to state that a vendee, upon rescission, is limited strictly to the purchase price which he paid for the property." ***Id***. at 540.

In the instant case, it is clear that the Buyers are *not* attempting to both "affirm and at the same time disaffirm" the sales contract and deed. *See* ***id***. at 537-38. They are clearly disaffirming these two documents. As in ***Isaacs***, the Buyers are *not* proposing to "affirm" their contract "and to keep its benefits, but to claim compensation for a difference in value." ***Id***. at 538. ***Isaacs*** stands for the proposition that a suit for rescission and damages, even one based upon non-fraud claims, does not necessarily involve inconsistent remedies.

Before a plaintiff can be *required* to elect one remedy to the exclusion of another, "[t]he remedies, . . ., must be truly inconsistent." ***Garrett v. Mazda Motors of America***, 844 S.W.2d 178,

180 (Tenn. Ct. App. 1992) (holding, in a suit for fraud and seeking rescission under the Tennessee Lemon Law, that it was not error to order damages as well as rescission). "The doctrine of election of remedies is not peculiar to actions based upon fraud, but it is, perhaps, most frequently applied or discussed in connection therewith." 27 Williston on Contracts § 69:56 (4th ed.). As we view the evidence in this case, again assuming the jury finds credible the portion favorable to the Buyers on one or both of the surviving theories of recovery, a judgment for rescission *and* damages is not necessarily inconsistent. To guard against an inconsistent verdict, the trial court on remand, with the assistance of the parties, should prepare and submit to the jury specific questions in order to guard against "a double recovery for a single wrong." ***Id***. (citing ***Purcell Enterprises, Inc. v. State***, 631 S.W.2d 401, 409 (Tenn. Ct. App. 1981)). If, on remand, the Buyers continue to seek both rescission and damages, the court will have to charge the jury as to the different burdens of proof for these two remedies. If an election must be made in order to avoid a "double recovery," it should be made *after* the jury has rendered its verdict with its answers to specific questions. *See* ***Rolen v. Wood Presbyterian Home, Inc.***, 174 S.W.3d 158, 162 (Tenn. Ct. App. 2005). *See also* ***Concrete Spaces, Inc. v. Sender***, 2 S.W.3d 901, 909-10 (Tenn. 1999). We note, in passing, that the Buyers, if successful on the issue of liability, may well be entitled to damages as well as rescission and restitution. In any event, the evidence in the record before us warrants submission of this case to the jury under a carefully crafted charge and special interrogatories on both the issue of rescission and the issue of damages.

In summary, the Buyers' claim of intentional misrepresentation is now foreclosed by the jury's verdict; what remains are the Buyers' claims based upon breach of contract and negligent misrepresentation. If the Buyers choose to proceed on remand both as to the remedy of rescission and restitution on the one hand and damages on the other, no election of remedies shall be required prior to the jury's verdict. To the extent the Buyers are seeking rescission and restitution, the burden of proof is clear and convincing evidence. On their suit for damages, the burden is preponderance of the evidence. If the Buyers continue to disaffirm the sale of the property to them and seek restitution, any damage award must be consistent with the disaffirming of the transaction. If the jury's verdict results in "a double recovery for a single wrong," there must be an election by the Buyers. The Court, with the assistance of the parties, should craft special interrogatories.

VI.

Conclusion

The judgment of the trial court is affirmed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to the appellee, Kathy Jones.

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CHARLES D. SUSANO, JR., JUDGE